No. 11938

In the United States Court of Appeals for the Ninth Circuit

Bo C. Roos and Frederick M. MacMurray, Individually and as Partners, Trading and Doing Business as Beverly-Wilshire Enterprises, appellants

vs.

Tighe E. Woods, Acting Housing Expediter, Office of the Housing Expediter, appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLEE

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JURISDICTION

This action was brought pursuant to Sections 205 (a), (c), and (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. Sec. 901 et seq.). Judgment of restitution was rendered upon authority of Section 205 (a) thereof.

FACTS

The sole question presented in this appeal is whether the District Court erred in finding as a fact that the tenant Morgan Conway rented the defendant's premises at a monthly, rather than a daily, rate. The maximum rent on a monthly basis was $100.50 to

Conway and his wife (Vol. I, Tr. 76–79). The maximum rent to Conway and his wife on a daily basis was $6.00 (Vol. I, Tr. 72). The defendants collected $180.00 per month based on the $6.00 rate for a "30 day period" (Vol. I, Tr. 56–66). Finding that the tenant rented the premises on a monthly rate, the Court ordered restitution of the overcharges based upon the difference between the maximum rent of $100.50 per month and the $180.00 actually collected, from June 1, 1946 to February 28, 1947 (Concl. of Law 3, Vol. I, Tr. 47 and 48).

STATUTES

The pertinent sections of the Statute and Federal Rules of Civil Procedure appear in the Appendix.

ARGUMENT

I

The District Court's finding that Morgan Conway occupied Unit No. 609 at a monthly rate, finds substantial support in the record. In no event was the finding so clearly erroneous that it should be set aside

Contrary to appellant's contention, the trial Court's finding that Conway occupied Unit No. 609 at a monthly rate is amply sustained by the record. This finding of fact finds support particularly in the testimony elicited upon cross-examination of R. C. Palmer, appellants' auditor for the premises who prepared the bills which Conway paid. (Vol. II, Tr. 76–78.)

> The COURT. But you didn't bill him for 30 days, did you? You billed him for the month, didn't you?

A. Well, we considered——

The COURT. It isn't what you considered but you did bill him for the month?

A. I billed him 30 days at $6.00 a day.

The COURT. Where are your bills to show that?

A. From 6–1 to 7–1, I billed him $180.

The COURT. Look over all of the bills there and show me a bill that is billed on a 30-day basis.

A. That is a 30-day basis.

The COURT. What month was that?

A. June.

The COURT. That happens to have 30 days.

A. Yes. And the next month was from 7–1 to 8–1, which was for 30 days.

The COURT. What does the bill show?

A. $180.

The COURT. That is 31 days, isn't it? July has 31 days?

A. That is right.

The COURT. And you billed him for 30 days?

A. That is right.

The COURT. This is from 7–1 to 8–1, 1946?

A. That is right.

The COURT. That is, you billed him from July to August, July 1st to August 1st?

A. The rent would be due again on August 1st.

The COURT. And you billed him for $180, and it would be 31 days, is that right?

A. That is right.

The COURT. I want you to show me a bill for a 31-day month, where you billed him for 30 days. Have you got one there?

A. That is one of them, a 31-day month, with a billing for 30 days, the very next one, August to September.

Q. Now, here is February, February, 1947, from 1–1 to 2–1, 1947, $180. How did you happen to bill him for the $180?

A. As I say, all of the months are considered 30 days and, if we had charged him 31 days for a month, in a year's time he would have paid more than if he paid it this way, because there are seven extra days in the year, and in February there are only three to complete the month.

The COURT. You say you billed him on a 30-day basis, but the bills show——

A. I am assuming we considered every month 30 days.

The COURT. It isn't what you considered but what you sent out. You sent out a bill, from month to month, for the current month and not for any 30-day basis? That is all I wanted to get clear in my mind.

A. To me, I billed him for 30 days because, as I say, 30 days is a month to us in the apartment house business.

The COURT. That is all I have to ask.

In addition to the above the Transcript also shows that on June 1, 1946, Conway was billed in advance from "6/1/1946 to 7/1/1946" (a 30-day period) for $180.00 (Vol. I, Tr. 52); he was billed in advance from "8/1/1946 to 9/1/1946" (A 31-day period) for $180.00 (Vol. I, Tr. 54); and he was billed in advance from "2/1/47 to 3/1/47" (a 28-day period) for $180.00 (Vol. I, Tr. 61).

On the basis of the testimony referred to above, the finding of the Court below is amply sustained and may not be disturbed. Rule 52 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A., foll. 723 (c)) provides in part:

> * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

In applying the above rule this Court has repeatedly held that where a finding is not clearly erroneous it is "obliged to accept it." *Coffin-Redington Co.* v. *Porter,* 156 F. 2d 113 (C. C. A. 9th); *Columbian National Life Insurance Co.* v. *A. Quandt & Sons,* 154 F. 2d 1006 (C. C. A. 9th); *Wingate* v. *Bercut,* 146 F. 2d 725 (C. C. A. 9th), *Goldstein* v. *Polakof,* 135 F. 2d 45 (C. C. A. 9th), *Cherry-Burrell Co.* v. *Thatcher,* 107 F. 2d 65 (C. C. A. 9th); *Lumberman's Mutual Casualty Co.* v. *McIver,* 110 F. 2d 323 (C. C. A. 9th).

In the *Coffin-Redington* case, *supra,* this Court after viewing the entire Record sustained the finding of the trial Court that the defendants violated the Emergency Price Control Act by a tie-in sale of liquors, stating at p. 114:

> The trial court observed their conduct and demeanor while on the stand, and was in better position than we to appraise the situation and to draw inferences. We are not able to say that the finding in question was clearly erroneous and are therefore obliged to accept it. (*Columbian National Life Ins. Co.* v. *A. Quandt & Sons,* 9 Cir., 154 F. 2d 1006.

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, the Supreme Court recently defined the term "clearly erroneous" as used in Rule 52 (a). There the Court said, at p. 395:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

The appellant devotes the greater part of his brief to showing that the testimony was contradictory, which is true. He also attempts to create greater weight for the testimony of his witnesses, as against the "vague and indefinite" (Br. 5) testimony of the tenant Conway.

The "entire evidence" in the case at bar, shows a conflict of testimony on the basic rental agreement. The tenant, however, unequivocally denied renting at a daily rate.

> Q. Did you understand you were renting an apartment at the rate of $6.00 per day?
>
> A. Why, frankly, no. I expected to stay on there and live there (Vol. II, Tr. 24).

Further, the testimony of Palmer, the defendants' auditor (p 2, *supra*), showed a monthly rather than a daily rental, and Exhibit 1 (Vol. I, Tr. 51–61) is the collected monthly statements given to Conway by the defendants, charging him $180.00 on a 30-day (or monthly) basis. The contrary evidence in support of defendants' case was that of Blanche Bryson, manager (Vol. II, Tr. 50), and Palmer's direct testimony (Vol. II, Tr. 73) to the effect that they told Conway

the rent on apartment 609 was $6.00 per day. Certainly, on the basis of a record in which five people testify in direct contradiction and where documentary proof substantiates the trial Court's finding, an appellate Court could not conceivably be "left with the definite and firm conviction that a mistake has been committed." (See *Shyman* v. *Fleming,* 163 F. 2d 461, 463, C. C. A. 9th.)

In appeals where the Record shows conflicting testimony the Courts have held that a finding by the trial Court on the basis of that evidence is "unassailable" in the Court of review (*United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 433 (C. C. A. 2d). The Court in that case, speaking through Judge Learned Hand, stated the rule as follows:

> * * * However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they "must be treated as unassailable." *Davis* v. *Shwartz,* 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289; *Adamson* v. *Gilliland,* 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 477, 58 S. Ct. 300, 82 L. Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part and often by no means the most important part, of the sense impressions which we use to make up our minds. *Morris Plan Industrial Bank* v. *Henderson,* 2 Cir., 131

> F. 2d 975, 977. Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed "unassailable," except in the most exceptional cases (at p. 433).

So, too, in this case where the Court below had the opportunity to observe the witnesses, and weigh each one's statements upon the basis of all factors before it, this Court should give due weight to the findings based upon those factors.

This Court stated the rule to be as follows, in *Columbian National Life Insurance Company* v. *A. Quandt & Sons* (154 F. 2d 1006):

> Where there is a conflict in the evidence, this court must keep in mind that the trial judge who hears and sees the witnesses has a better opportunity to appraise their credibility and judge the weight to be attached to their testimony. We cannot say that the finding of the lower court was clearly erroneous. It is the rule that the findings of the trial court are to be accepted on appeal unless clearly wrong.

a. Consideration of appellants' argument

The appellants, at the outset of their arguments, accuse the Court below of arriving at its finding through consideration of "numerous irrelevant fac-

tors" (p. 4 of brief). We do not think that this unwarranted charge against an experienced and able trial judge is supported by the record. Evidently, appellants are of the opinion that the decision of a trial Court on any given question must be arrived at in a vacuum. The Courts, however, have taken a more balanced view of the judicial process. As the Court of Appeals said in *Dumas* v. *King,* 157 F. 2d 463 (C. C. A. 8th), cited by appellant (Br. 9), in describing the function of the trial Court in arriving at its findings:

> To weigh opposing evidence, determine credibility of witnesses, and choose between permissible inferences is the function of the trial court, and findings of fact thus made cannot ordinarily be said to be clearly erroneous if they are supported by substantial evidence. *Kincade* v. *Mikles,* 8 Cir., 144 F. 2d 784, 787 (at p. 465).

Therefore, there was nothing that occurred at the trial below, whether of testimony, demeanor of witnesses, documentary evidence, or circumstances surrounding the various transactions that were not material and relevant to the trial Court in arriving at its decision. Having arrived at its decision on the basis of these factors an appellate Court will not lightly overturn it (See cases, p. 5, *supra*), for the application of the rule in this Circuit, and cases cited by appellants (Br. Footnote 4, p. 9).

In their brief, appellants explain that "* * * it is the customary practice in hotel and apartment house operations to consider every month as containing

thirty days" (Br. 9). If a month is considered to be a 30-day period, it would follow that both for billing and renting purposes the terms "month" and "30-day period" are synonomous. Hence, when R. C. Palmer says "* * * 30 days is a month to us in the apartment house business," he means that the terms are interchangeable. When Conway was billed on a 30-day basis, he was therefore simultaneously billed on a monthly basis. It is not only specious for appellant to argue that Conway was charged the daily rate on a monthly basis, but likewise there is no merit to the contention that the finding below was manifestly erroneous, where the record amply shows that Conway was not charged nor did he pay $6.00 per day for each day's occupancy.

Furthermore, appellants took the position upon the trial that the tenant was billed on a daily basis and that its practice of billing every thirty days, regardless of the number of days in the month, followed the practice prevailing in hotel and apartment-house operations of considering every month as containing thirty days (brief p. 9). If that was the billing practice for the daily basis, what then was the billing practice on the monthly basis? Appellants did not say. Yet, for all that appears, the billing practice ascribed by appellants to be limited to hotels and apartments on a daily basis, might have been precisely the practice used in these accommodations on a monthly basis. At any rate, as the Court below aptly observed (Vol. II, Tr. 91):

> People who rent their apartments on daily rates should make their position known in some

positive fashion, either by posting something in the rooms or submitting a bill that will at least give the other person, the tenant, an intimation that that is the arrangement.

In their brief (p. 8) the appellants take the isolated factor of the form of rent payment, and argue that monthly billing "overrode a definite agreement." Appellants beg the question. The trial had before it the entire Record of conflicting testimony plus documentary evidence. Considering all of the testimony the Court determined what the original rental agreement was and therefore did not "change this definite agreement," as appellants contend. That determination (Concl. of Law 3, Vol. I, Tr. 47) must be given due weight by this Court. (*Coffin-Redington* v *Porter, supra; Columbia National Life Insurance Company* v. *A. Quandt, supra; Bercut* v. *Wingate, supra.*

Appellants in their footnote 4 (Br. 9) emphasize that the Rule 52 (a) follows the former equity practice. We agree. The Supreme Court in discussing the application of Rule 52 (a) has recently so held. "It was intended, in all actions tried upon the facts without a jury to make applicable the then prevailing equity practice." (*United States* v. *United States Gypsum Company,* 333 U. S. 365, 395.) But following the equity practice simply means that in applying Rule 52 (a) "* * * findings of the trial Court when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate Court" (id. p. 395). Certainly, "construing the testimony most favorably in support of this finding," as this Court is "re-

quired to do" (*Chatz* v. *Armour Plant Employee's Credit Union,* 154 F. 2d 236, 240 (C. C. A. 7th) it cannot be said that the Record in this case does not support the finding of the Court below that Conway rented apartment 609 on a monthly basis. If this Court construes the testimony in favor of the finding and gives "great weight" to that finding, it cannot be said that this Court is "left with the definite and firm conviction that a mistake has been committed."

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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APPENDIX

THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

SEC. 205. (c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found: *Provided, however,* That all suits under subsection (e) of this section shall be brought in the district or county

in which the defendant resides or has a place of business, an office, or an agent. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

SEC. 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court:

(a) *Effect.*—In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its con-

clusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the Court adopts them, shall be considered as the findings of the Court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

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